

REMARKS:

This is a full and complete response to the Office action dated August 15, 2008. Favorable reconsideration is respectfully requested. Applicants wish to thank the Examiner for granting the telephone interview on August 26, 2008 and amending the Office Action of August 15, 2008 to non-final status as indicated in the Interview summary of September 3, 2008.

REGARDING THE CLAIMS:

Claims 9-13, 17, 18 and 20-29 are pending in the application. Claim 13 has been amended to correct antecedent basis. No new matter has been added.

IN RESPONSE TO THE OFFICE ACTION:

REJECTION UNDER 35 U.S.C. § 102:

Claims 9-13, 17, 18, and 20-29 stand rejected under 35 USC §103(a) as being unpatentable over Hirtsiefer, US 5,546,705 (hereinafter “**Hirtsiefer**”) in view of Parker et al., US 3,640,423 (hereinafter “**Parker**”), and Jones, US 2,656,563 (hereinafter “**Jones**”).

The Examiner has alleged that **Hirtsiefer** in view of **Parker** and **Jones** renders the present claims obvious. A brief summary of the Examiner’s position is as follows. The Examiner asserts that **Hirtsiefer** discloses a vehicular mountable cargo carrier with a top portion hinge connected for pivotation between and open and closed position relative a bottom portion by use of a spring based strut. According to the Examiner, **Hirtsiefer** does not disclose a pair of struts, and therefore relies on **Parker** to assert that it would be obvious to use a pair of side struts with the cargo lid of **Hirtsiefer**. *Office Action, August 15, 2008, page 3.*

The Examiner furthermore relies on **Jones**, asserting that it would have been obvious to one of ordinary skill in the art to limit the force communication point from passing the line oriented parallel to a direction of an operationally effective force imposed by said biasing spring between said two arms and intersecting a pivot connection between said two arms of **Hirtsiefer**, in order to ensure that the strut of

Hirtsiefer was never counterbalanced, and could always easily provide an opening force to the cargo container it is mounted upon. *Office Action, August 15, 2008, page 4.*

Applicants respectfully submit that the present claims would not be obvious to one of ordinary skill in the art in view of the cited references and reasons suggested in the Office Action. The Supreme Court in *KSR*,¹ although criticizing a rigid application of the “teaching, suggestion, or motivation” test, made clear that “**a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.**” *KSR, at 1741.*

Furthermore, the Court reiterated that “[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning.” *KSR, at 1742.* In its admonition against impermissible hindsight bias, the Court cited *Graham*,² where in said decision, the Court had warned “against a ‘**temptation to read into the prior art the teachings of the invention in issue**’ and instruct[ed] the courts to ‘guard against slipping into the use of hindsight.’ ” *KSR, at 1742.*

Applicants respectfully submit that the Examiner is engaged in impermissible hindsight reconstruction. It is urged, therefore, that one of ordinary skill in the art would have no motivation in view of the cited references, common sense or the state of the art for the combination and modification as suggested in the Office Action. Accordingly, Applicants respectfully request the Examiner’s reconsideration of the claims and withdrawal of the above mentioned rejection.

As indicated in Applicants reply filed January 17, 2008, **Hirtsiefer** discloses the use of **struts that develop a closing-assist force** between the top and bottom portions of the cargo box **tending to close the cargo box**. **Hirtsiefer** describes that to achieve the necessary closing force of the closing element relative to the container, it is proposed that, with reference to the connecting line, the eccentricity and thus the effective lever arm of the pressure spring in the position of the arms corresponding to the closed position and the spring characteristics of the pressure spring are preferably based on the required

¹ *KSR Int’l v. Teleflex Inc.*, 127 S.Ct. 1727, 82 USPQ2d 1385, 1397 (2007).

² *Graham v. John Deere Col. Of Kansas City*, 383 U.S. 1, 86 S. Ct. 684, 15 L.Ed.2d, 545.

As indicated in **Jones**, in refrigerator cars, there “are floor racks or pallets used to provide a raised platform upon which materials may be stored.” *Jones, column 1, lines 17-22*. Furthermore, when such racks are not in use, “the racks may be pivoted upward...in cars heretofore used, that the outer ends of the racks be hooked to the vertical wall to prevent them from dropping down.” *Jones, column 1, lines 22-29*. The problem which **Jones** wishes to solve is then revealed:

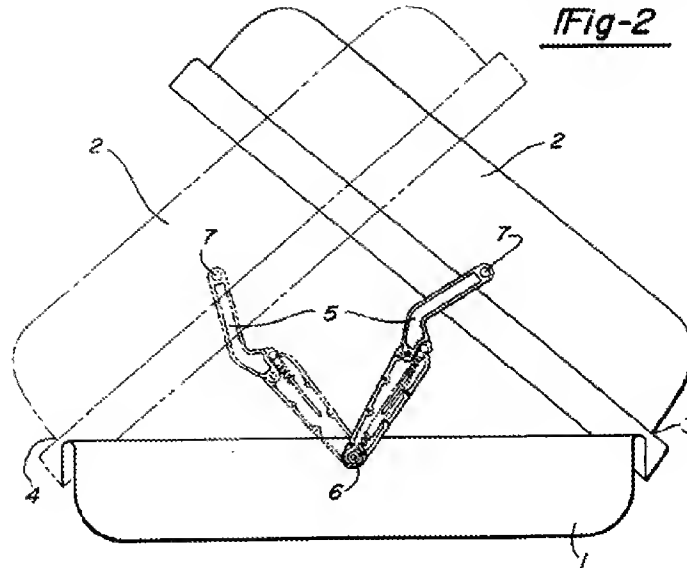
The **racks used in refrigerator cars are of heavy construction** to support the weight of the articles carried on them, and are, therefore, of substantial weight so that **if they are permitted to drop in a free fall**, when unhooked from the walls, **considerable damage may be done** to them or to the insulated floor against which they strike. There is also a serious and constant danger or injury to personnel required to work in the car and to raise and lower these floor racks. *Jones, column 1, lines 29-39*.

Accordingly, with respect to purpose of the device of **Jones**:

It will be appreciated that in most arrangements in which a movable member is horizontally hinged, it **is desirable to prevent the rapid descent** of the member from the vertical to the horizontal position, this problem being singularly acute in the case of floor racks in refrigerator cars. Therefore, it is an important object of this invention to provide a **new and improved device which will retard the movement of the hinged moveable member** as the outer end moves downward into the horizontal position. *Jones, column 1, lines 29-36*.

Thus, in view of the above it can be seen (1) that the hinged structures of **Jones** are platforms or covers which are raised up in a vertical closed position, and then are lowered to a horizontal position when brought down, (2) it is intended for hinged members which are of heavy construction, (3) it is intended to retard the movement of the hinged member from moving downward.

Regarding (1) above, it should be noted that the hinged structures of **Jones** are strikingly different from the cargo boxes of **Hirtsiefer**. Fig. 2 of **Hirtsiefer** is shown for convenience:



Cargo boxes such as that shown in Fig. 2 of **Hirtsiefer** are intended when shut to be fully enclosed structures. Furthermore, when users wish to open them, they generally raise the top lid. The struts disclosed in **Hirtsiefer** are intended to aid this process, in both closing and opening. On the other hand, the hinged structures of **Jones** are significantly dissimilar. They are singular flat planar members which are raised against a wall or an opening (similar to a cupboard/cabinet) when in the closed position, and are pulled outward toward a user as they are brought down to a horizontal position so that something may be placed on them. The platform or covers of **Jones** differ radically in their structure and use from cargo boxes.

Furthermore, with respect to (2) as noted above, **Jones** was directed to platform members of heavy construction. *Jones, column 1, lines 29-36*. The danger was a **free fall drop, which could cause considerable damage to person or property**. *Jones, column 1, lines 29-39*. Accordingly, the retardation action of Jones is primarily to prevent a rapid and dangerous fall by a heavy platform. *Jones, column 1, lines 29-36*. This is radically different from cargo boxes, where the lids are of comparatively flimsy construction (semi-flexible), and pose no such dangers. *Application, paragraph 5*. Furthermore as they are not opened and pulled outward down toward a user, there is no danger of harm as there is with the platforms of **Jones**. Cargo boxes are merely opened and closed for placing objects inside. Accordingly one of ordinary skill in the art, seeing

the flimsy construction of cargo lids and the heavy construction of the platforms of **Jones**, would not consider Cargo boxes to be in need of such retardation.

Additionally, with respect to (3), the **Jones** reference discloses that its hinged device is designed to retard downward movement of a platform. However, completely contrary to this, and as noted above, the **Hirtsiefer** strut is designed to **develop a closing-assist force**. *Hirtsiefer*, column 2, lines 1-7. Therefore, **the Jones reference teaches against a primary objective of Hirtsiefer**. Thus, one of skill in the art, in considering the close assisting force in **Hirtsiefer**, would not therefore use the retardation device of **Jones**.

In view of the above, Applicants submit that the proffered reason in the Office Action for modifying **Hirtsiefer** in view of **Jones** “to ensure that the strut of Hirtsiefer was never counterbalanced” has no basis. *Office Action, August 15, 2008, page 4*. As **Jones** is directed to a device for retarding the fall of heavy platforms which are drawn out toward a user, and **Hirtsiefer** discloses a closing-assist force for comparatively flimsy cargo boxes, one of skill in the art would not consider that such cargo boxes or strut of **Hirtsiefer** should be modified to “ensure it...was never counterbalanced.”

Applicants respectfully submit that such modification of **Hirtsiefer** according to that noted in the Office Action is merely based on impermissible hindsight reconstruction. That the combination would not be considered by one of ordinary skill in the art in view of the cited references and their teachings, the state of the art, or “common sense.” Accordingly, Applicants respectfully submit that no prima facie case of obviousness can be established.

In view of the comments above, it is respectfully requested that the rejections be withdrawn and a Notice of Allowance issue with respect to the currently pending claims.

The undersigned representative requests any extension of time that may be deemed necessary to further the prosecution of this application.

The undersigned representative authorizes the Commissioner to charge any additional fees under 37 C.F.R. 1.16 or 1.17 that may be required, or credit any overpayment, to Deposit Account No. 14-1437, referencing Attorney Docket No.: 7298.098.NPUS02.

In order to facilitate the resolution of any issues or questions presented by this paper, the Examiner may directly contact the undersigned by phone to further the discussion.

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